Bell Security, Inc. *and* Allied International Union, Petitioner. Case 29–RC–7860

July 30, 1992

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

Employer's request for review of the Acting Regional Director's Supplemental Decision on Objections and Direction of Second Election is denied as it raises no substantial issues warranting review. A copy of the relevant portions of the Acting Regional Director's decision is attached.[1]

[1] The Acting Regional Director found merit in Objection 1, but at one point inadvertently referred to it as Objection 3. We correct the inadvertence.

The Employer requested review only of the Acting Regional Director's finding as to Objection 1.

APPENDIX

SUPPLEMENTAL DECISION ON OBJECTIONS AND DIRECTION OF SECOND ELECTION

Upon a petition for certification filed on July 9, 1991 by Allied International Union, herein called the Petitioner, and pursuant to a Decision and Direction of Election issued by the Regional Director on March 20, 1992, an election by secret ballot was conducted on April 24, l992 in a unit consisting of all full time and regular part time security guards employed by the Employer at its Staten Island, New York branch excluding all office clerical employees, professional employees and supervisors as defined in the Act.

The Tally of Ballots served upon the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters	50
Number of void ballots	0
Number of votes cast for Petitioner	15
Number of votes cast against participating labor organization	18
Number of valid votes counted	33
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	34

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has not been cast for Petitioner.

Thereafter, on May l, l992 the Petitioner filed objections to the results of the election. The objections allege, verbatim, as follows:

> 1. Bell security by its agents, Local 803 of the International Brotherhood of Teamsters, engaged in conduct designed to undermine the Allied International Union by urging the members of the bargaining unit to vote against Allied International Union. Upon information and belief, a Mr. McRay, an officer of Local 803, engaged in a campaign designed to undermine Allied International.
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> . . . .

Pursuant to Section 102.69 of the Board's Rules and Regulation, Series 8, as amended, the Regional Director caused an investigation to be made of the objections, during which all parties were afforded a full opportunity to submit evidence bearing on the issues. The investigation disclosed the following:

The Employer is a New York corporation with its principal office and place of business located at 501 5th Avenue, New York, New York where it is engaged in providing security services for various establishments located in New York and New Jersey.

THE OBJECTIONS

All the Petitioner's objections concern a leaflet distributed by an agent of Local 803, International Brotherhood Teamsters, AFL–CIO, prior to the election. The leaflet is attached hereto as Exhibit A. Because each objection alleges that 803's conduct is objectionable under a different theory, I will first discuss, the facts, which are largely undisputed, and then discuss each objection separately.

Albert Fenza and Peggy Vanson, business agents for the Petitioner, gave affidavits. They state that on the evening prior to the election, they heard that Local 803 had distributed the leaflet. Because it was late in the evening, Ms. Vanson only had the opportunity to speak to 2 guards by phone to attempt to rebut the assertions made in the leaflet.

The election was conducted the following day at two polling places, one classroom located at the Saint George campus of Staten Island Community College, and another classroom located at the college's Sunnyside campus. Vanson and Fenza visited both campuses on the morning of the election. Vanson stated that when they arrived at the Saint George campus at about 7:00 a.m. they saw Kenneth McKay, the Vice President of Local 803 in the hallway on the first floor sitting at a table.[1] There were abour six security guards in the hallway at the time. On the main desk was a pile of the aforementioned leaflets with a copy of Mr. McKay's business card at the top. Fenza and Vanson told the board agent conducting the election about what they had seen, and went to the Employer's Sunnyside campus. At that campus, they saw him. The Petitioner provided no evidence, even in the form of hearsay, that the Employer assisted 803 in its actions or otherwise endorsed them.

McKay gave an affidavit. He admitted distributing the leaflet in question the evening before the election. However, he stated that he did not do any campaigning on the morning of the election, but just went to both polling places to make sure the polls had opened.

McKay contends that in the leaflet he was describing the situation as accurately as he could, and that he was responding to literature produced by the Petitioner. He stated that it was his understanding that this case had already been before the Board for two and a half years. He further asserted that various agents of the Employer had informed him that if a majority of employees voted for the Petitioner, it would file objections. Based upon the past history of the case before the

[1] The polling took place in a classroom on the sixth floor.

Board, he did not expect the Board to resolve the objections expeditiously. McKay also did not expect the Employer to continue making contributions to 803's Health and Welfare fund while objections were pending. He thus expected employees to be in a state of ''limbo,'' with no health and welfare benefits while the objections were pending. Among the literature that McKay stated he was responding to was a letter from the Petitioner's attorney to Petitioner's business agent Fenza, concerning how a victory by the Petitioner could effect employees' health and welfare coverage, a copy of which is attached hereto as Exhibit B. Fenza admits that he gave a copy of the letter to George Downer, 803's shop steward. Downer asserts that he left a copy of the letter on his desk for about 2 days before the election, but he did not know if other employees read it.

A review of the history of this case shows that on July 31, 1989 Allied International Union filed a petition in Case No. 29–RC–7104 seeking an election among a unit of all full time and regular part time security officers employed by the Employer at Staten Island Community College. On June 20, 1991 the Regional Director issued a Decision and Order dismissing the Petition. Thereafter, on July 19, 1991 the Petitioner refiled the Petition and amended the unit to include all full time and regular part time security officers employed at the Employer's Staten Island branch. A hearing was held concerning the appropriateness of the unit, and the case was transferred to Region 28 for the limited purpose of issuing a Decision. On March 20, 1992 the Regional Director for Region 28 issued a Decision and Direction of Election. The Employer filed a Request for Review of said Decision. By Order dated April 20, 1992 the Board denied the Employer's Request for Review. Accordingly, the election was conducted on April 24, 1992. Although Local 803 is the bargaining representative of the employees in the unit, it was not accorded a place on the ballot because it admits nonguards to membership.

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Objection No. 1

In Petitioner's Objection No. 1, the Petitioner alleges that 803 attempted to undermine the Petitioner by urging employees to vote against it. As noted earlier, although 803 was technically a third party, it may be appropriate to examine its conduct under the Board's standards applied to first parties because of its intense involvement in the case and its status as the incumbent union. I will therefore again examine its conduct under both standards.

The leaflet from Local 803 states that a vote for the Petitioner means ''No health and welfare benefits until appeal is ruled on (another 2-1/2 years).'' The message on the leaflet is clear: If employees select the Petitioner as their collective bargaining representative, they will have no health and welfare benefits until the Board certifies the election, which may not occur for another two and a half years. Such an assertion is bound to have an impact upon employees. Because of 803's status as incumbent union, it would appear to be in a position to know whether the 803 health and welfare fund would terminate coverage for employees during the hiatus between the election and the certification or whether the Employer would continue to make contributions during the period. It would also not be unreasonable for employees to conclude from the assertions in this leaflet that 803 would cause its health and welfare fund to terminate the employees' coverage during the hiatus. In *Willey's Express, Inc*., 275 NLRB 631 (1985), the Board found that a union agent's statement to employees that they were illegally covered under a trust fund to which the employer made contributions because the employer was not a party to a collective bargaining agreement, constituted an implied threat that they would lose their insurance coverage unless they voted for union representation. The Board found this to be coercive and set aside the election. The Board found this conduct to interfere with employees' freedom of choice regardless of whether the trust fund coverage was illegal and regardless of whether the union had the right to investigate the trust fund. In the instant case, the leaflet clearly threatens employees with an immediate cessation of coverage if they select the Petitioner as their representative. This is coercive regardless of whether the 803 health and welfare fund had the right to cease coverage prior to the issuance of any Board certification and regardless of whether the Employer could lawfully cease contributions to that fund pending a certification. It is also noted that the leaflet was distributed the evening before the election, which did not afford the Petitioner an adequate opportunity to respond, and that the outcome of the election was determined by 3 votes.

Alternatively, even viewing 803's conduct as that of a third party, I would find it to be objectionable. Among the factors the Board examines in analyzing threats not attributable to a party are the ability of the person making the threats to carry them out, their dissemination, and their timing in relation to the election. See *Westwood Horizons*, supra. As earlier noted, it would appear reasonable for employees to conclude that 803 had the ability to cause its health and welfare fund to terminate the employees' coverage or to at least be in a unique position to know about the Employer's and fund's intentions. The leaflet was admittedly distributed to several employees and the Petitioner did not have an adequate opportunity to respond to the leaflet.

I also do not conclude that the effects of the leaflet were dissipated by the Petitioner's attorney's letter to his client written three days earlier (Exhibit B). That letter merely states that if the 803 fund ceased coverage, it would still be obligated to provide coverage under COBRA, in which case the employees would have to pay for their own coverage. It is also not clear that this letter was widely disseminated among employees.

In view of the above, I find the threats made in the letter to be objectionable under both the standards applied to first and third parties. I therefore direct that Petitioner's Objection No. [1] be sustained and that the election be set aside. Accordingly, I direct that a new election be conducted.

[Direction of Second Election omitted from publication.]